IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 1[redacted]

MORGENSTERN CHEMICAL CO., INC.,
Petitioner,

vs.

G. D. SEARLE & CO.,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BERNARD M. SHANLEY,
Counsel for Respondent,
744 Broad Street,
Newark 2, New Jersey

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Counter-Statement of Questions Presented

I. Was the Court of Appeals correct when, after it considered all the facts, it decided the equities would be fully satisfied by an injunction?

II. Should this Court issue a writ of certiorari to review a decision not conflicting with another decision, presenting no important question of federal law, and not requiring the exercise of the Court's power of supervision?

III. Does this Court have jurisdiction to issue a writ of certiorari when there is no case in the Court of Appeals?

Counter-Statement

Petitioner prays that, in this action for trademark infringement, a writ of certiorari issue to the United States Court of Appeals for the Third Circuit for the review of so much of its judgment, entered March 12, 1958, directing the entry of a judgment of injunction, as denied an accounting of profits and for the review also of that court's denial, on March 27, 1958, of petitioner's motion for the amendment of that judgment by adding a direction that the district court grant damages (compensatory and/or exemplary) and attorney's fees and expenses (Petition, p. 1)*.

The judgment as to which review is sought reversed the district court's holding for respondent and remanded the case with directions to grant an injunction but to deny an accounting (Petition, p. 37). Subsequent to entry of that judgment petitioner served and filed a motion to amend it to provide for damages and counsel fees; this motion was denied by order entered on March 27, 1958 (Respondent's Appendix, pp. 14-15).

The following day, on March 28, 1958, the Court of Appeals issued its mandate ordering the district court to reverse its judgment "with costs, and directions to grant an injunction but to deny an accounting of profits." (Respondent's Appendix, pp. 15-16).

On March 31, 1958, the petitioner filed in the district court a "MOTION FOR JUDGMENT ON REMAND, ETC.", as follows (Respondent's Appendix, p. 17):

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* Throughout this Brief references to the record will be:

Pages in the Petition for Writ of Certiorari will be designated (Petition, p. . .).

Pages in this Respondent's Appendix to this Brief will be designated (Respondent's Appendix, p. . .).

Pages in this Respondent's Appendix filed in the Court of Appeals and certified in this Court will be designated (. . .b).

"Plaintiff hereby moves on and under the mandate of the United States Court of Appeals for the Third Circuit, dated March 28, 1958, and on the trial record and all the proceedings heretofore had in this case and the affidavits and memorandum submitted herewith, for:

"1. The award to the plaintiff against the defendant of exemplary damages in such amount as to the court may seem just;

"2. The assessment and award to the plaintiff against the defendant of the fees and expenses of its attorney, as such and as damages, in the sum of $40,000 or such other sum as the court will adjudge to be fair value of such services;

"3. The entry of judgment in the form proposed and submitted herewith."

Briefs and affidavits were filed for and against the motion as it related to the awarding of damages and counsel fees and extensive oral argument was had, following which, on May 5, 1958, an opinion and order were filed by the district court denying petitioner's motion "for the inclusion of counsel fees in its costs" and denying punitive damages (Respondent's Appendix, pp. 38, 41).

On June 4, 1958, the petitioner filed a Notice of Appeal from the district court to the Court of Appeals for the Third Circuit "from so much of the judgment entered herein [in the district court] on or about May 5, 1958, as denied to plaintiff damages and, or including, attorney's fees and from the order entered on or about May 13, 1958, amending the said judgment." (Petition, p. 42).* Then, and notwithstanding said appeal, on June 9, 1958, petitioner filed in the Supreme Court its petition for writ of certiorari.

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* The order of May 13, 1958, relates merely to the procedures to be carried out by respondent in complying with the injunction.

ARGUMENT

POINT I

The Court of Appeals properly held that under the equities of the case, petitioner was not entitled to an accounting, damages or counsel fees.

In its opinion and judgment filed and entered on March 12, 1958, the Court of Appeals enjoined respondent's further use of the name "Mictine," stating (Petition, p. 36):

> "* * * If there is *any possibility of* * * * *confusion* in the case of medicines *public policy* requires that the use of the confusingly similar name be enjoined. * * *" (emphasis supplied)

The tone of the opinion of the court below is also demonstrated by the following additional excerpt therefrom (Petition, p. 34):

> "* * * In a suit to enjoin the use of a trade-name, as distinguished from an action for the recovery of damages or profits from its use, it may be equitable as well as in the public interest, under particular circumstances, to enjoin the defendant from using his trade-name although it is not applied to a product which is similar to that to which the plaintiff's name is applied, and even though the defendant does not seek to induce purchasers to buy his goods instead of those of the plaintiff."

Subsequent to entry of judgment on March 12, 1958, the Court of Appeals, on March 27, 1958, consistent with its earlier determination denying an accounting, denied petitioner's motion for amendment of the judgment to provide for damages and counsel fees (Respondent's Appendix, p. 15).

Petitioner herein does not touch upon the foregoing rationale of the decisions to which review is now sought. Instead, petitioner pretends outrage at what it calls a "profitable tortious appropriation and utilization * * * of plaintiff's trade name * * *" and argues that the effect of a decision granting an injunction but no "monetary redress" results in allowing "a deliberate tortfeasor to retain all the fruits of its wilful appropriation without any compensation to the owner * * *." (Petition, p. 7).

Petitioner then resorts to argument—and authority—which, if accepted on petitioner's terms, would call for the imposition in *every* common law trade mark case, wherein an injunction had issued, of an accounting, damages and counsel fees (Petition, pp. 7-13).

But, of course, this is not the law. Thus, in its opinion the Court of Appeals stated (Petition, p. 37):

> "It does not follow that because a trademark owner is entitled to an injunction to prevent future infringement he is ipso facto entitled to an accounting of profits. [citations omitted. They are printed at p. 37 of the Petition]. An accounting will be denied where an injunction will satisfy the equities of the case. Champion Plug Co. v. Sanders, 1947, 331 U. S. 125, 131. Upon consideration of the facts of the present case we are clear that the district court did not err in denying an accounting and that the equities will be fully satisfied by the granting of an injunction against future use of the name Mictine by the defendant."

To determine what these equities were obviously requires an examination of the complete record. Certainly they include more than the fact that the two products are non-competing and for totally different ailments and that there was no "palming off" by respondent, notwithstand-

ing petitioner's contention to the contrary (Petition, pp. 2-3).

Some of these equities are to be found set forth in the opinions below. See, for example, the facts as set forth in the district court opinion concerning petitioner's destruction of sales records prior to 1955; its total sales figures of $83.92 and $58.37 for 1955 and 1956, respectively; its complete abandonment of promotion of its product in early 1953 (over a year before respondent conceived of the name "Mictine" and almost two years before respondent's first sales under the name "Mictine"); and the obvious differences in design and packaging which would make it clear that there was no "palming off" (Petition, pp. 18-22).

Nowwhere does petitioner contend that it lost even one dollar of sales as a result of respondent's use of the word "Mictine." Moreover, petitioner has conceded that respondent never attempted to mislead or confuse the public into thinking that "Mictine" was in fact petitioner's product, "Micturin" (35b).

Finally, there is no evidence in the record that respondent's sales were in part made not through the intrinsic worth of its product but rather through the sound or suggestiveness of the name "Mictine." In fact, there is ample evidence to the contrary (290b, 294b, 295b, 336b, 417b, 418b, 419b, 432b).

Having thus examined into the equities of the matter, and having granted an injunction, the Court of Appeals properly held that petitioner was not entitled to additional and further relief.

As to the denial of an accounting, the Court of Appeals is clearly upheld by *Champion Plug Co.* v. *Sanders*, 331 U. S. 125, 131 (1947), holding that a plaintiff whose trade

mark has been infringed and who is entitled to an injunction has no right to an accounting of profits unless he proves at least these three facts: (1) the defendant engaged in his conduct with the purpose of securing the benefit of the plaintiff's reputation in the market; (2) the defendant's profits have resulted from the marketing of goods of a kind which compete with the plaintiff's goods and in markets in which the plaintiff's goods are available for purchase or in which the defendant attempts to forestall their sale; (3) there is a reasonable prospect that the accounting will be substantial.

In the case at bar the petitioner did not prove even one of these elements and, in fact, concedes at least as to numbers (1) and (2) that the proof is in favor of respondent.

In a case decided on June 11, 1958, *Perfectform Corp.* v. *Perfect Brassiere Co.*, —— F. 2d —— (C. A. 3, 1958), the Court of Appeals for the Third Circuit makes clear one reason why it, in the case at bar, had denied the petitioner an accounting:

> "We are not at all sure that an injunction to prevent future use of the name PERFECTFORM OR PERFECT FORM in script, block letters or otherwise by the appellee will satisfy the equities of this case. *There is evidence of substantial damage and loss of profits to the plaintiff which is attributed to the unlawful use of its tradename by appellee. This demands a thorough inquiry. Cf. Morgenstern Chemical Company, Inc.* v. *G. Searle & Company.*" (Emphasis supplied).

In the *Perfectform* case the Court of Appeals reversed the judgment of the district court and remanded the case with directions to issue an injunction and ordered an accounting "to ascertain whether plaintiff has sustained any damage and loss of profits from defendant's unfair com-

petition and if so, in what respects." The accounting was ordered because, as stated earlier in said opinion, the Court of Appeals had found "sufficient evidence before us to call for an inquiry on whether plaintiff has been damaged thereby [the defendant's unfair competition] and if so, in what respects."

In the case now before this Court, as is clear from the opinion below, the Court of Appeals had considered the facts and had found no such evidence as appeared in the *Perfectform* case. It therefore properly denied an accounting.

The required proof is that there not only be fraud and palming off but also that it be particularly outrageous. In *Aladdin Mfg. Co.* v. *Mantle Lamp Co. of America*, 116 F. 2d 708, 717, *cert. denied*, 296 U. S. 639 (1935), a trademark infringement case, which the petitioner relies upon, for example, the court noted that exemplary damages "* * * are not a favorite in law * * * and are, therefore, to be allowed only with caution and confined within narrow limits." Later, the same court in *Keller Products* v. *Rubber Linings Corp.*, 213 F. 2d 382 (C. A. 7, 1954), which the petitioner also relies upon, refused to award exemplary damages to the plaintiff even though the defendant's packaging of its infringing product "Tub Cove" was designed substantially to imitate the plaintiff's package for its product "Tub Kove,"—"Defendant even copied the cross section view of plaintiff's strip although the cross section view of its own product was different" (213 F. 2d 382, 386)—even though there was direct competition between the two products, and even though the plaintiff proved that the defendant intended to palm off. The court stated (213 F. 2d 382, 387):

> "In a case of willful and wanton infringement the trial court has discretion to award punitive damages,

but such damages should only be awarded in extreme cases, Aladdin Mfg. Co. v. Mantle Lamp Co. of America, 7 Cir. 116 F. 2d 708, 716; such damages 'are not a favorite in law,' Id., 116 F. 2d at page 717. See: Post v. Buck's Stove & Range Co., 8 Cir., 200 F. 918, 43 L.R.A., N.S., 498. Here the validity of the mark 'Tub-Kove' and whether any secondary meaning had attached to that mark were close questions. That defendant had used entirely different colors on its package than plaintiff had used was a mitigating consideration. Although plaintiff is entitled to an injunction, as determined by the trial court, we think it an abuse of discretion to have allowed punitive damages, and the judgment will be modified by eliminating the allowance of $1,500 as punitive damages."

In the case at bar neither the district court nor the Court of Appeals found fraud or palming off on the part of the respondent, nor was there any proof whatsoever that the respondent willfully and wantonly infringed. Indeed, throughout this case the petitioner has conceded that the respondent never intended to nor did take advantage of any good will developed by the petitioner (34b, 35b).

The decision denying the petitioner counsel fees was also correct. In *Century Distilling Co.* v. *Continental Distilling Corp.*, 205 F. 2d 140 (C. A. 3, 1953), the court found a willful and deliberate use of the confusing name "Dixie Dew" on a product in direct competition with the plaintiff's product, "Dixie Belle," and the district court found that the defendant's conduct was calculated or likely to cause confusion, mistake or deception in the minds of the public. Yet, because there was not fraud by the defendant, the Court of Appeals refused to award counsel fees.

In each of the six trademark cases the petitioner relies upon to support its claim for counsel fees, there were fac-

tors not present here. In *Aladdin Mfg. Co.* v. *Mantle Lamp Co.*, 116 F. 2d 708 (C. A. 7, 1941), *cert. denied*, 296 U. S. 639 (1935), there were facts supporting an award of exemplary damages and the defendant was guilty of willful and fraudulent conduct in the sense that the defendant intended to use the infringing name to cause harm to the plaintiff. In every one of the other trademark cases the petitioner relies upon, the courts awarded counsel fees because of the defendant's fraud and as part of the compensatory or exemplary damages awarded to the plaintiff. *Admiral Corp.* v. *Penco, Inc.*, 203 F. 2d 517 (C. A. 2, 1953); *Keller Products* v. *Rubber Linings Corp.*, 213 F. 2d 382 (C. A. 7, 1954); *Leggett & Co.* v. *Premier Packing Co.*, 140 F. Supp. 328 (D. C. Mass. 1956); *National Van Lines* v. *Dean*, 237 F. 2d 688 (C. A. 9, 1956); *Youth Form Co.* v. *R. H. Macy, Inc.*, 153 F. Supp. 87 (D. C. N. D. Ga. 1957).

Here the Court of Appeals found that the facts did not entitle the petitioner to an accounting of profits and that the equities would be fully satisfied by the granting of an injunction. Moreover, the petitioner did not prove fraud or palming off by the respondent, and the petitioner clearly had no right to compensatory or exemplary damages. As a result the Court of Appeals correctly decided that the petitioner had no right to counsel fees.

POINT II

There is no conflict of decision, no important question of federal law and no need for this Court to exercise its power of supervision.

The petitioner states that the writ should be granted because the Court of Appeals reached a shocking result contrary to the accepted and usual course of judicial proceedings (Petition, p. 7). It argues also that the result "ur-

gently calls for the intervention of this Court's supervisory and corrective jurisdiction" (Petition, p. 13).

Although counsel for the petitioner pretends to be outraged by the decisions below granting his client an injunction but no money, this result, as the respondent has shown, is not an exceptional situation but rather the proper result under the facts.

Petitioner does not argue that there is a conflict of decision between these decisions below and a decision in a like case decided by another Court of Appeals. Nor does it show an important question of federal law. Quite to the contrary, respondent has shown that three separate decisions at three different times in lower courts are completely in accord with other decisions in federal courts.*

Finally, the petitioner has not show any reason why this Court should exercise its power of supervision over either of the lower federal courts. Indeed, those courts in this case reached decisions based upon authoritative federal law.

POINT III

This Court lacks jurisdiction to entertain this application.

Petitioner rests jurisdiction in this proceeding on 62 Stat. 928 (1948), 28 U. S. C. 1254(1). In view of the following, it would seem that jurisdiction is lacking since there is no case "in" the Court of Appeals within the meaning of that statute.

Following its entry of judgment on March 12, 1958, and its denial thereafter, on March 27, 1958, of petitioner's

* The three decisions were the Court of Appeals' first judgment, its denial of the petitioner's motion to amend that judgment, and the district court's recent decision after the case was remanded to it.

motion to amend that judgment to provide for "monetary redress," the Court of Appeals, on March 28, 1958, issued its mandate to the district court.

Extensive proceedings thereupon occurred in the district court (*supra*, pp. 2-3) which denied the petitioner the remedies it nows asks this Court to consider. Moreover, the petitioner's Notice of Appeal shows that the case is not in the Court of Appeals. In other words, the petitioner asks this Court to review a case which formerly was in the Court of Appeals but which was remanded to the district court where a final judgment was entered. Presently there is pending petitioner's second appeal to the Court of Appeals (see Notice of Appeal, Respondent's Appendix, p. 20).*

At no time did the petitioner utilize local Rule 36(2) of the Court of Appeals by applying to that court for a stay of the mandate to enable it to obtain a review in this Court. Instead, the petitioner chose to obtain a final judgment in the district court enjoining the respondent in many respects and the respondent has now filed in that court a lengthy affidavit attesting to compliance with the detailed terms of that injunction.

It would therefore appear that the statutory requisite for this application is unfulfilled and jurisdiction is lacking in this Court to entertain the petition.

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* The petitioner has called the second appeal a "precautionary step." (Petition, p. 13, footnote.)

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

BERNARD M. SHANLEY,
Counsel for Respondent.

Appendix A

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
2046 U. S. COURT HOUSE
PHILADELPHIA 7

March 24, 1958

Copal Mintz, Esq.
150 Broadway
New York 38, N. Y.

Re: Morgenstern Chemical Company, Inc.,
appellant
vs.
G. D. Searle & Company
No. 12326

Dear Sir:

This will acknowledge receipt of a motion to amend the judgment in the above entitled case. In accordance with our Rule 5(3) the motion, and answer in opposition, if any, will be submitted to the panel, without hearing.

Please notify opposing counsel that there will be no hearing March 31, 1958.

The mandate will not issue while the motion is pending.

Very truly yours,

Ida-O. Creskoff
Clerk

sw
cc: Shanley and Fisher, Esqs.

Appendix B (Order of U. S. Court of Appeals, Denying Motion to Amend Its Judgment)

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
No. 12326

MORGENSTERN CHEMICAL COMPANY INC.,

Appellant,

vs.

G. D. SEARLE & COMPANY.

Present: MARIS, McLAUGHLIN and STALEY, *Circuit Judges.*

Upon consideration of the motion by appellant to amend the judgment of this Court in the above entitled case

It is ORDERED that the motion be and it hereby is denied.

By the Court,

MARIS
Circuit Judge

March 27, 1958

Appendix C (Mandate on Reversal by the U. S. Court of Appeals for the Third Circuit

WHEREAS, lately in the United States District Court for the District of New Jersey, before you or some of you, in a cause between Morgenstern Chemical Company, Inc., Plaintiff and G. D. Searle and Company, Defendant (District Court No. 263-56 Civil Action) a judgment was entered on June 20, 1957 and amended by Order of June 27, 1957, in

favor of Defendant and against Plaintiff, as by the inspection of the record of the said District Court, which was brought into the United States Court of Appeals for the Third Circuit by virtue of an appeal by Morgenstern Chemical Company, Inc. agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

And Whereas, the said cause came on to be heard before the said United States Court of Appeals for the Third Circuit, on the said record, and was argued by counsel;

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs, and the cause remanded with directions to grant an injunction but to deny an accounting of profits. March 12, 1958

You, Therefore, Are Hereby Commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Signed and sealed this 28th day of March in the year of our Lord one thousand nine hundred and fifty-eight.

Ida O. Creskoff,
Clerk, United States Court of
Appeals for the Third Circuit

Appendix D (Plaintiff's Motion in District Court for Judgment on Remand, etc.)

Plaintiff hereby moves on and under the mandate of the United States Court of Appeals for the Third Circuit, dated March 28, 1958, and on the trial record and all the proceedings heretofore had in this case and the affidavit and memorandum submitted herewith, for:

1. The award to the plaintiff against the defendant of exemplary damages in such amount as to the court may seem just;

2. The assessment and award to the plaintiff against the defendant of the fees and expenses of its attorney, as such and as damages, in the sum of $40,000 or such other sum as the court will adjudge to be fair value of such services;

3. The entry of judgment in the form proposed and submitted herewith.

Dated: March 31, 1958

CHAZIN & CHAZIN
Attorneys for Plaintiff
by COPAL MINTZ,
Of Counsel.

NOTICE OF HEARING

To: SHANLEY & FISHER, ESQS.
Attorneys for defendant
744 Broad Street
Newark 2, New Jersey

PLEASE TAKE NOTICE that the above motions will be brought on for hearing by, and the above relief will be applied for to, the Hon. Reynier J. Wortendyke, Jr., J., at

his Courtroom in Room 4 of the United States Court House and Post Office Building, Newark, New Jersey, on the 14th day of April, 1958, at 10 A.M. or as soon thereafter as counsel will be heard.

Dated: March 31st, 1958

Yours, etc.,

CHAZIN & CHAZIN
Attorneys for Plaintiff
by COPAL MINTZ,
Of Counsel.

* * *

Appendix E

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
NEWARK 1, N. J.

May 5, 1958

Re: C-263-56—Morgenstern Chemical Co. Inc. v. G. D. Searle & Co.

Copal Mintz, Esq.,
150 Broadway,
New York 38, New York

Shanley & Fisher, Esqs.,
744 Broad Street,
Newark 2, New Jersey

Gentlemen:

Upon the precedent of *Kansas City Southern Railway v. Guardian Trust Co.*, 281 U. S. 1, I have decided to deny

plaintiff's application for the inclusion of counsel fees in its costs.

I construe the opinion of the Court of Appeals in this case, when interpreted in the light of the views expressed by that Court in *Century Distilling Co.* v. *Continental Distilling Corp.*, 205 F. 2d 140, as precluding the award of punitive damages to the plaintiff in this case.

I have considered the respective drafts of injunction decree submitted by each of the parties hereto, and have embodied the directive of the mandate of the Court of Appeals in my decree filed this date, a copy of which is enclosed herewith for your information.

Very truly yours,

REYNIER J. WORTENDYKE, JR.
Judge, United States District Court

RJW, Jr/e

Original to Clerk for file.

(Filed—May 5, 1958)

Appendix F (Notice of Appeal)

Notice is hereby given that Morgenstern Chemical Company, Inc., the plaintiff above named, hereby appeals to the United States Court of Appeals in and for the Third Circuit, from so much of the judgment entered herein on or about May 5, 1958 as denied to plaintiff damages and, or including, attorney's fees and from the order entered on or about May 13, 1958 amending the said judgment.

Dated: May 31, 1958

CHAZIN & CHAZIN,
Attorneys for Plaintiff
By ABRAHAM CHAZIN,
A member of the firm
30 Journal Square
Jersey City, New Jersey

COPAL MINTZ,
Of Counsel for the Plaintiff

CLERK OF THE UNITED STATES DISTRICT COURT

SHANLEY & FISHER, ESQS.
Attorneys for Defendant
744 Broad Street
Newark, New Jersey